IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

FRIDAY, THE 23RD MARCH 2007 / 2ND CHAITHRA 1929

CRL.A.No. 1235 of 2002()

CRA.175/2000 of III ADDL. SESSIONS COURT (AD HOC), THRISSUR
ST.2328/1996 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, THRISSUR

.....

APPELLANT: APPELLANT/IST RESPONDENT/COMPLAINANT.

THOMAS, S/O.KURUTHUKULANGARA PELLISSERY
POULOSE, AMMADAM DESOM, PARALAM VILLAGE,
THRISSUR TALULK.

BY ADV. SRI.DINESH MATHEW J.MURICKEN

RESPONDENTS: APPELLANT & 2ND RESPONDENT/ACCUSED.

---

1. MATHAI, S/O.CHERUPADIYIL KURIAKOSE,
KANTHALAM, KAYARADI VILLAGE, CHITTOOR TALUK.

2. STATE OF KERALA REPRESETNED BY THEPUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.G.SREEKUMAR (CHELUR)
PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1235 of 2002 (D)

Dated this the 23rd March, 2007.

J U D G M E N T

The complainant is the appellant. He preferred a complaint under Section 138 of the Negotiable Instruments Act, in short 'the Act', before the Judicial First Class Magistrate Court-II, Thrissur, as S.T.Case No.2328/1996. Ext.P1 cheque issued for Rs.32,000/- by the first respondent-accused was dishonoured, when presented. Therefore, Ext.P3 lawyer notice was sent by the appellant-complainant. On receipt of the notice, the first respondent had sent Ext.P6 reply. In it, he had admitted that an amount is due to the complainant. But he did not say the exact amount due. However, he further stated in Ext.P6 that he had sought for time, for payment of the amount to the complainant. But without heeding to that, the complainant had filled up the blank cheque, given to him, and shown a higher amount, in it.

2. To prove the case of the appellant, PWs.1 to 3 were examined. Seven documents were marked. One witness was examined on the side of the accused. The learned Magistrate, after

appreciating the evidence adduced by both sides, found the first respondent guilty of the offence under Section 138 of the Act. Therefore, convicted and sentenced him to undergo rigorous imprisonment for three months and, also to pay an amount of Rs.32,000/- to the complainant, in default to undergo imprisonment for 45 days.

3. The first respondent challenged the same before the III Additional Sessions Judge, (Ad hoc) Fast Track Court-I, Thrissur, as Crl.A.No.175/2000. The learned Judge, finding that Ext.P1 was a blank cheque, issued as a security, and all other particulars in Ext.P1, except the signature, had been written by the appellant, concluded that Ext.P1 cannot be accepted. Hence, dismissed the complaint and acquitted the accused, allowing the appeal. Challenging the said order of acquittal, this appeal is filed after obtaining leave.

4. The facts are that the appellant gave an elephant, on 03/12/1995, to the first respondent-accused. There was a lease agreement, dated 14/12/1995, between both, through which the first respondent-accused agreed to pay an amount of Rs.32,000/- per men

sum, for the use of the elephant, to the appellant-complainant. According to the appellant, the elephant was continuously used by the first respondent, but he did not pay any amount. There was a negotiation between the parties on 07/04/1996. The total amount due to the appellant was arrived at Rs.96,000/-. Ext.P1 cheque for Rs.32,000/- was issued. The balance amount was paid by the first respondent. However, the cheque was dishonoured, leading to the filing of the complaint.

5. As stated above, in Ext.P6 reply notice, the first respondent concedes that some amount is due to the appellant. He did not specify the exact amount due. The elephant admittedly died on 05/05/1996. The counsel for the first respondent submits that the elephant was sick and, therefore, he could not use the animal. From 03/12/1995, the elephant was with the first respondent. Thus till its death, it comes to five months. Even if, one month is deducted, being the sick period of the animal, the balance four months has to be counted for calculating the payment, by the first respondent to the

appellant. However, the parties have settled it for Rs.96,000/-, including Ext.P1 cheque amount of Rs.32,000/-, the balance amount having been paid to the appellant.

6. The signature in Ext.P1 is not disputed. But the contention of the first respondent is that the other particulars in Ext.P1 cheque had been filled up by the appellant, himself and the blank cheque was issued only as a security. DW.1 was cited and examined by the first respondent, to prove that the entire amount due to the appellant had been paid off, for the use of the elephant. But there is no explanation forthcoming, why Ext.P1 cheque was not received back. Moreover, the first respondent did not enter the box and explain the circumstances. Therefore, there is no contra evidence available to rebut the presumption. In **Lillykutty vs.Lawrance** [2003(3) KLT 721], a Division Bench of this Court held that, if there is no objection, a blank cheque could be filled up by the holder of the cheque, there being an implied consent for putting the date, as and when required, unless the contrary is proved. Similarly, the Court also held that unless the presumption is rebutted and the contrary is proved, the negotiable instrument was made for consideration.

7. In **I.C.D.S vs. Beena Shabeer** [2002(3) KLT 218 (SC)]. It was held that the phrase 'any debt or other liability', mentioned in Section 138 of the Act, includes a cheque issued for security.

8. In the above facts situation, even if, Ext.P1 was a blank cheque issued, after affixing the signature by the first respondent-accused, the complainant-appellant is entitled to fill-up the other portions. In the absence of any explanation, as to why Ext.P1 cheque was not received back by the accused, if the entire amount due to the appellant was discharged, I am unable to accept the evidence of DW.1, particularly, when the first respondent accused did not enter the box.

9. In the above circumstances, together with the legal and factual decisions, I hold that the learned Additional Sessions Judge was not correct in reversing the findings of the learned Magistrate.

10.In the result, the appeal is allowed, the impugned judgment dated 04/09/2002 of the III Additional Sessions Judge, (Ad hoc), Fast Track Court-I, Thrissur, in Crl.A.175/2000, is set aside.

The conviction entered into by the Judicial Magistrate of the First Class Court-II, Thrissur, in S.T.No.2328/1996, is restored. However, the sentence of rigorous imprisonment for three months is modified to that of simple imprisonment for one month. The compensation amount of Rs.32,000/- is sustained. But I grant the first respondent-accused, three months time from this date, to pay the said amount of Rs.32,000/- to the appellant. If the compensation amount is not paid as above, the first respondent-accused shall undergo further simple imprisonment for one month.

I make it clear that if the parties file an application for compounding the offence under Section 147 of the Act, the learned Magistrate shall pass appropriate orders allowing it, as per the law.

J.M. JAMES,
JUDGE

ms

J.M.JAMES, J.

- - - - - - - - - - - - - - - - - - - -

Crl.A. No. 1235 of 2002

- - - - - - - - - - - - - - - - - - - -

J U D G M E N T

23rd March, 2007